UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE PRINCERIDGE GROUP LLC,

Plaintiff,

-against-

OPPIDAN, INC.,

Defendant.

Case No. 11 CV 1460 (AJN)

Civil Action

REPLY MEMORANDUM OF LAW ON BEHALF OF THE PRINCERIDGE GROUP LLC IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Leo V. Leyva
Jed M. Weiss
Cole, Schotz, Meisel,
Forman & Leonard, P.A.
A Professional Corporation
900 Third Avenue
16th Floor
New York, NY 10022-4728
212.752.8000
212.752.8393 (fax)
Attorneys for Plaintiff The PrinceRidge Group LLC

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PRELIMINARY STATEMENT[1]

In an effort to avoid Summary Judgment, Oppidan intentionally mischaracterizes sworn deposition testimony and asks this Court to completely disregard the parties' written contract, which was negotiated and revised by Oppidan's in-house counsel. Without any sound basis, Oppidan concludes that it can simply ignore its contractual obligation to pay PrinceRidge the Success Fee because PrinceRidge was "not a broker." (Def. Br., pp. 6-10.) The statute upon which Oppidan relies, however, does not apply to the undisputed facts here.

Oppidan bases its misapplication of New York Real Property Law Section 442-d on a New York State Supreme Court, Second Department, Appellate Division decision in which the transaction at issue was solely related to the purchase and sale of real estate among unsophisticated parties. See Futersak v. Perl, 84 A.D.3d 1309, 1310 (N.Y. App. Div. 2011). Those facts are **not** similar to this case and, accordingly, Futersak is not applicable. The undisputed facts prove that PrinceRidge was retained by Oppidan as its "exclusive advisor," (not *real estate broker*), in connection with the "*possible* [s]ale" of the Portfolio. (Exclusive Engagement Agreement, Exhibit E to Declaration of Matthew Kirsch submitted in Support of Plaintiff's Motion for Summary Judgment ("Kirsch Decl."), ¶ 1.) In fact, according to the express terms of the parties' agreement, PrinceRidge was not required to sell any Properties to earn its fee. Pursuant to Section 3 of the Exclusive Engagement Agreement, among others, Oppidan was required to compensate PrinceRidge for its Advisory Services if PrinceRidge *either*: (i) successfully introduced a potential buyer to the Portfolio or (ii) if Oppidan removed a property from the Portfolio during PrinceRidge's engagement. (Id. at ¶ 3.) As such, the Exclusive Engagement provided compensation for PrinceRidge even if no property in the

[1] Undefined capitalized terms used herein are given the meanings set forth in PrinceRidge's moving papers in support of its motion for summary judgment.

Portfolio was sold. As described in more detail below, this is drastically different from the sale of property at issue in Futersak.

This undisputed fact proves that PrinceRidge was not acting in a real estate brokerage capacity, rather, as an investment banker, as Oppidan knew well. In connection with the Advisory Services, PrinceRidge was required to: (i) familiarize itself with the "properties, business, operations, financial condition, management and prospects of the portfolio (the "Assets")"; (ii) introduce Oppidan to potential buyers of the Assets; and (iii) provide other advisory and investment banking services to Oppidan. (Id.) PrinceRidge was not identified as a "broker" in the Exclusive Engagement Agreement, and, more importantly, it did not act as a real estate broker in this transaction. PrinceRidge fully performed its Advisory Services under the Exclusive Engagement Agreement and introduced NRP to the Transaction. In direct breach of that agreement, however, Oppidan failed to pay PrinceRidge the Success Fee PrinceRidge has earned by introducing NRP to a Transaction that resulted in a $100 million payday for Oppidan. For these reasons, and those addressed further below and in PrinceRidge's moving papers, this Court should grant PrinceRidge's motion for summary judgment.

LEGAL ARGUMENT

I. THE EXCLUSIVE ENGAGEMENT AGREEMENT IS AN ENFORCEABLE CONTRACT NEGOTIATED BY SOPHISTICATED PARTIES AND THEIR COUNSEL.

There is no question here that the parties entered into a legally enforceable Exclusive Engagement Agreement. Oppidan's argument otherwise is incredulous, at best, and the caselaw Oppidan cites in support is inapplicable here. In a continuing effort to avoid having to comply with its contractual obligations to compensate PrinceRidge for advisory services that lead to a $100 million windfall for Oppidan, Oppidan' argues the Exclusive Engagement Agreement is unenforceable because PrinceRidge was not a licensed real estate broker at the time it rendered services to Oppidan. (Def. Br., pp. 5-6.) In order for the Exclusive Engagement Agreement to be enforceable, however, PrinceRidge was **not** required to be a licensed real estate broker because the Exclusive Engagement Agreement did not require PrinceRidge to provide any real estate brokerage services.

As set forth by the New York Court of Appeals in Northeast Gen. Corp. v. Wellington Adv., PrinceRidge did not have to be a real estate broker to receive compensation for the Advisory Services it performed for Oppidan related to the Properties. 82 N.Y.2d 158 (NY 1993). In Northeast Gen. Corp., the parties entered into a written agreement pursuant to which Northeast was entitled to a "Completion Fee" when a transaction closed between Wellington and any party "introduced and/or presented by [Northeast] to [Wellington]." 82 N.Y.2d at 160-61. Northeast introduced Wellington to a potential purchaser with whom Wellington ultimately entered into a purchase agreement. Id. Wellington failed to pay the Completion Fee, however, arguing that Northeast was acting as a broker and, thus, owed Wellington a fiduciary duty to disclose certain information regarding the potential purchaser that Wellington argued would have effected its decision to sell to that purchaser. Northeast sued to recover its fee. Id. The Court held that Northeast was entitled to its fee because the services Northeast rendered were that of a "finder", not a "broker". Id. at 161 ("By its terms, the understanding between these parties called for a simple service: the finder was to introduce purchaser 'candidates' to Wellington for which the finder would be paid a finder's fee if a completed transaction ensued.") Northeast Gen. is factually *identical* to the situation here, where, among other services provided, PrinceRidge sought to "find" entities interested in an investment portfolio of Properties for Oppidan.

Oppidan asks this Court to completely disregard the controlling precedent set forth in Northeast Gen. Corp., and instead apply the Supreme Court, Second Department Appellate Division's decision in Futersak v. Perl, 84 A.D.3d 1309 (2d Dept. 2011). There, however, the Second Department, Appellate Division, considered the application of Real Property Law Section 442-d to the purchase and subsequent sale ("flip") of a certain parcel of real property. Id. at 1310. The parties were individuals looking to make a quick profit by purchasing and quickly selling a piece of property. Id. The plaintiff formed a limited liability company specifically for the purpose of flipping the property and contracting with defendant. Id. The Court determined that Section 442-d applied because "the subject property was the dominant feature of the transaction at issue." There, the plaintiff needed a real estate broker's license to recover the contractual fee. Id. at 1310-11.

Unlike the agreement between two unsophisticated parties regarding the "flip" of a particular parcel of real property at issue in Futersak, here, pursuant to the Exclusive Engagement Agreement, PrinceRidge (a FINRA-regulated broker/dealer) performed Advisory Services only. The Advisory Services PrinceRidge provided pursuant to the Exclusive Engagement Agreement included a number of services, of which the "possible sale" of the Properties was merely one. See Exclusive Engagement Agreement. One of PrinceRidge's primary responsibilities was to introduce people or entities to the investment opportunity presented by Oppidan. Unlike the real property at issue in Futersak, which was a single property being "flipped" for a profit, the Properties here are investment retail buildings that Oppidan leases to various retailers throughout the country. (Kirsch Decl. ¶ 2.)

Moreover, unlike the agreement at issue in Futersak, which states that the plaintiff was entitled to its fee because plaintiff was retained to find a buyer to purchase the property, the

Exclusive Engagement Agreement sets forth a number of tasks that make up the "Advisory Services". These include: (i) familiarizing itself with all aspects of Oppidan's business so it could explain the investment opportunity to potential investor/purchasers; (ii) introducing Oppidan to potential buyers of the assets; and (iii) providing advisory and investment banking services to Oppidan. (Exclusive Engagement Agreement, ¶ 1.) Additionally, for its services PrinceRidge was to earn a fee even if it did nothing and Defendant removed a property from the Portfolio. (Exclusive Engagement Agreement, ¶ 3(b).) The Exclusive Engagement Agreement did not require PrinceRidge to sell anything[2]—PrinceRidge did not even have the authority to negotiate the potential sale of the Properties (Kirsch Decl. ¶ 36); it's role was strictly limited to finding potential investors for the Transaction and other investment banking services. (Kirsch Dep. I 159:6-14.). As such, Section 442-d is inapplicable.

Furthermore, there is no indication that the parties in Futersak entered into an agreement similar to the Exclusive Engagement Agreement, pursuant to which the plaintiff was obligated to do significantly more than merely find a buyer for the property. PrinceRidge presented an investment opportunity to its contacts which resulted in an introduction and a deal being consummated. The New York Court of Appeals' decision in Northeast Gen. Corp. is precisely on point, and the Court should find that, unlike the plaintiff in Futersak, PrinceRidge is not required to have a real estate broker's license to recover the Success Fee which is unarguably due and owing.

Oppidan's reliance on Merrick Gables Ass'n v. Town of Hempstead, 691 F.Supp.2d 355 (E.D.N.Y. 2010) is also misplaced. Merrick involved an *oral* contract and found that the *oral* agreement was unenforceable because the terms were contrary to the law at issue. 691

[2] Of course, this language does not exist in any of the real estate brokerage agreements Oppidan produced in discovery. See Kirsch Decl. Exh. R.

F.Supp.2d at 363. Merrick, of course, is completely inapposite to the facts here, where there is a written contract, negotiated by Oppidan and its in-house counsel (Dave Scott), (Ryan Dep., 16:6-11, 41:14-17.), and admittedly executed by both parties. (Ryan Dep., 16:22-17:7.)

Without question, the Exclusive Engagement Agreement is a valid, enforceable contract, and as a result of Oppidan's undisputed breach of this contract, PrinceRidge is entitled to summary judgment.

II. OPPIDAN BREACHED THE CONTRACT BY FAILING TO PAY PRINCERIDGE THE FULLY EARNED SUCCESS FEE AFTER CONSUMMATING AT LEAST TWO DEALS WITH NRP RELATED TO THE PORTFOLIO.

Oppidan does not deny that it consummated a deal with NRP following PrinceRidge's introduction of NRP to the Transaction. (Def. Br., pp. 11-14.) Rather, Oppidan argues that, because it had a "pre-existing relationship" with NRP, PrinceRidge did not meet its obligations under the Exclusive Engagement Agreement. (Def. Br., pp. 11-14.) This purported defense seeks a result that departs from **express** terms of the Exclusive Engagement Agreement, which Oppidan conveniently misstates in an effort to support its self-serving, otherwise unsupportable, position.

With respect to PrinceRidge's obligation to find a buyer for the Assets, The Exclusive Engagement Agreement provides that PrinceRidge shall: "…(ii) introduce the [Oppidan] to potential buyers of the Assets . . . ." (Exclusive Engagement Agreement, ¶ 1(b). The Exclusive Engagement Agreement, that was negotiated by Oppidan's attorney, Dave Scott, does not state anywhere that a potential buyer PrinceRidge finds and introduces to the Transaction must be one Oppidan never met or did business with. Simply put, there are no "carve-outs" contained in the Exclusive Engagement Agreement. In fact, Joe Ryan admitted at his deposition that he has inserted these types of "carve outs" in other agreements Oppidan has entered into, but that he did not request one here. (Ryan Dep. 51:2-9.) Accordingly, whether Oppidan had a pre-existing relationship with NRP is entirely immaterial to the Court's analysis.[3] Significantly, Oppidan does **not** dispute the material fact that PrinceRidge introduced NRP to the Transaction.

Even more significant is that Oppidan's argument that PrinceRidge is not entitled to the Success Fee because Oppidan had a pre-existing relationship with NRP is contradicted by Oppidan's own conduct. Oppidan was well aware that PrinceRidge was discussing the Transaction with NRP. Kirsch Dep. II 356:7-25. Oppidan, however, did **not** object to PrinceRidge doing so. Rather, Ryan instructed Kirsch to continue to discuss the Transaction with NRP. Id. Accordingly, Oppidan cannot seriously argue that its pre-existing relationship with NRP precluded PrinceRidge's right to the Success Fee. If Oppidan truly believed this argument, Ryan would have stated as much to Kirsch when Oppidan learned that PrinceRidge was introducing NRP to the Transaction, rather than creatively conjuring up this argument now.

Oppidan seeks to avoid its clear contractual obligations by misstating PrinceRidge's work under the Exclusive Engagement Agreement as consisting of merely introducing Oppidan to someone "new". (Def. Br., p. 11.) This is not a factual question that prevents summary judgment, contrary to Oppidan's argument (see Def. Br., p. 12). Rather, it is a matter of contractual interpretation, which by a plain reading of the Exclusive Engagement Agreement can be decided by the Court on summary judgment as a matter of law. See Nycal Corp. v. Inoco PLC, 988 F.Supp. 296, 299 (S.D.N.Y. 1997).

In Nycal, this Court noted that: "summary judgment is appropriate in a contract interpretation dispute whenever there is no genuine issue of fact, a situation that [arises] not only

[3] Oppidan blatantly misstates the alleged cited language from Oppidan's moving papers. PrinceRidge never admit that it was aware of a pre-existing relationship between Oppidan and NRP. (See Pl. Br., p. 14 fn 6 ("*Whether* Oppidan had a pre-existing relationship with NRP is immaterial." (emphasis added).)

when the language is unambiguous, but also when the language is ambiguous and there is relevant extrinsic evidence, but the extrinsic evidence creates no genuine issue of material fact and permits interpretation of the agreement as a matter of law." Here, because there is no genuine issue of material fact with respect to the language in the Exclusive Engagement Agreement, the Court can interpret the language regarding the introduction by PrinceRidge to potential buyers of the Assets. See id. The language of the agreement cannot be more clear. The first paragraph of the Exclusive Engagement Agreement states, "We are pleased that Oppidan, Incorporated (the "Company") has selected The PrinceRidge Group LLC ("PrinceRidge") to act as its **exclusive advisor**. . ." Kirsch Decl. Exh. E (emphasis added). The Exclusive Engagement Agreement continues, "[Oppidan] hereby retains PrinceRidge as its **exclusive advisor**. . ." Id. (emphasis added). This language does not require interpretation, PrinceRidge was clearly retained to act as a financial advisor only, and **not** a real estate broker. This is unlike Oppidan's brokerage agreements, attached to the Kirsch Decl. as Exhibit R, which state, "In consideration of services to be rendered by **Broker**, Owner employs **Broker** as its exclusive **agent** to procure purchasers. . ." Kirsch Decl. Exh R (emphasis added).

Furthermore, Oppidan's reliance on Fredericks v. Chemipal, Ltd., 06 Civ. 966 (GEL), 2007 U.S. Dist. LEXIS 49185 (S.D.N.Y. 2007) for the proposition that ambiguities in the contract will be resolved "against the party who prepared or presented it," does not support Oppidan's position with respect to the interpretation of the lack of carve-outs. This proposition would apply only if the parties here were not sophisticated and/or did not have counsel to represent them in the negotiations. See Shadlich v. Rongrant Assoc., LLC, 66 A.D.3d 759 (2d Dept. 2009) ("the rule that ambiguous language in a contract will be construed against the drafter is not applicable[] because the subject lease resulted from negotiations between commercially sophisticated entities."). Here, Oppidan's in-house counsel revised and negotiated the Exclusive Engagement Agreement on its behalf. (Ryan Dep., 16:6-11, 41:14-17.) It never sought to include carve outs or amend any language in the Exclusive Engagement Agreement pertaining to PrinceRidge's obligation to introduce Oppidan to "potential buyers of the Assets." (Ryan Dep., 42:13-43:2.) This is despite Ryan admitting that Oppidan has included these standard carve-outs in other agreements it has entered into. See Ryan Dep. 51:1-9; 77:17-19. As such, Oppidan's insinuation that its failure to include carve-outs in the Exclusive Engagement Agreement should be construed *against* PrinceRidge is entirely without merit. See Citibank, N.A. v. 666 Fifth Ave. Ltd Partnership, 2 A.D.3d 331 (1st Dept. 2003). In Citibank, the Court looked to the parties' course of conduct to determine their intent when certain lease provisions were found ambiguous. The Court explained as follows:

> The ambiguities are **not**, however, to be construed against defendant by reason of its having drafted the initial version of the leases, since the lease agreements ultimately entered into resulted from extensive negotiations in which both parties, each a commercially sophisticated entity, were represented by counsel, and plaintiff failed to show it had no voice in the selection of the [subject] language.
>
> 2 A.D.3d at 331 (emphasis added).

Here, it is undisputed that Oppidan's counsel negotiated the Exclusive Engagement Agreement on its behalf, and as such, any perceived ambiguity on Oppidan's part in the Exclusive Engagement Agreement cannot be construed in favor of Oppidan. (Ryan Dep., 16:6-11, 41:14-17) The relevant portions of the Exclusive Engagement Agreement are clear, and the undisputed material facts show that Defendant breached the agreement. As such, the Court should grant summary judgment on PrinceRidge's breach of contract claim.

CONCLUSION

Oppidan has gone to great lengths to "rewrite" the Exclusive Engagement Agreement to include non-existent language supporting its strained attempt to defeat PrinceRidge's motion for summary judgment. The undisputed material facts, however, demonstrate that: (i) the parties, through counsel, negotiated and executed the Exclusive Engagement Agreement; (ii) the Exclusive Engagement Agreement provides that PrinceRidge earned its Success Fee when it introduced Oppidan to a potential buyer of the Assets; (iii) PrinceRidge was providing "Advisory Services," not *brokerage* services to Oppidan; and (iv) Oppidan failed to pay PrinceRidge the Success Fee. Oppidan breached the Exclusive Engagement Agreement. As a matter of law, summary judgment is appropriate and, accordingly, PrinceRidge is entitled to summary judgment on its breach of contract claim.

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April 15, 2013

Respectfully submitted,

COLE, SCHOTZ, MEISEL,
FORMAN & LEONARD, P.A.
A Professional Corporation
Attorneys for Plaintiff The PrinceRidge Group LLC

By: /s/ Leo V. Leyva

Leo V. Leyva
Jed M. Weiss
Cole, Schotz, Meisel,
Forman & Leonard, P.A.
A Professional Corporation
900 Third Avenue, 16th floor
New York, NY 10022-4728
(212) 752-8000